

## 21 C.J.S. Courts § 231

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### Courts

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### VI. Rules of Adjudication, Decisions, and Opinions

#### B. Stare Decisis

##### 5. Nature of Prior Decisions

## § 231. Unpublished decisions

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### West's Key Number Digest

West's Key Number Digest, [Courts](#)  107

**Unpublished opinions have no precedential value other than their persuasiveness and generally should not be cited.**

Unpublished opinions have no precedential value<sup>1</sup> other than the persuasive force of their reasoning<sup>2</sup> and should not be cited<sup>3</sup> except for the purpose of establishing the defense of res judicata, collateral estoppel, or law of the case.<sup>4</sup> An unpublished federal decision is not binding or precedential in state courts, but state courts may follow the same reasoning if they find it persuasive.<sup>5</sup>

An opinion that is not designated for publication is written primarily for the parties;<sup>6</sup> thus, a decision without an opinion becomes the law of the case<sup>7</sup> but does not establish a precedent on any legal issue decided.<sup>8</sup> Nevertheless, some court rules permit citing an unpublished opinion if it has persuasive value for a material issue in a case and would assist the court,<sup>9</sup> its persuasive value is manifestly superior to any published opinion,<sup>10</sup> or there is no published opinion that would serve as well<sup>11</sup> provided that counsel serves a copy of the opinion<sup>12</sup> and any other favorable and unfavorable relevant unpublished material known to exist<sup>13</sup> on all other parties in the case and on the court.<sup>14</sup> Other courts do not prohibit citing unpublished, nonprecedential opinions.<sup>15</sup> Also, it has been held that prior unreported cases of an appellate court may be cited by the court and trial courts, and counsel may rely on them as authority.<sup>16</sup>

A statute forbidding the citation of unpublished opinions "as precedent or authority" does not preclude citing an opinion solely to demonstrate a conflict in the decisions of the various intermediate courts.<sup>17</sup> Furthermore, the use of unpublished decisions to

show the State's actual judicial practice is encouraged.<sup>18</sup> A rule that unpublished opinions may be cited, but have no precedential value, does not justify unreasoned inconsistency by an appellate court but does not require that the appellate court specifically distinguish the unpublished opinion.<sup>19</sup> A state supreme court's orders depublishing an intermediate court's opinion generally signifies that the high court disapproved of something in the opinion.<sup>20</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

A memorandum disposition is, at best, persuasive authority. *Dickinson v. Shinn*, 2 F.4th 851 (9th Cir. 2021).

Although Court of Appeal would take judicial notice of unpublished case that applied test articulated in *Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, for determining whether newspaper delivery carriers were employees or independent contractors, as case was record of a court in California, case was not binding and lacked precedential value, and had, at most, persuasive value. Cal. Evid. Code § 452(d). *Becerra v. McClatchy Co.*, 69 Cal. App. 5th 913, 284 Cal. Rptr. 3d 784 (5th Dist. 2021).

A lower court may not rely on an unpublished order except in the limited circumstances provided for in court rules. Ill. Sup. Ct. R. 23(e). *Cook v. Village of Oak Park*, 2019 IL App (1st) 190010, 438 Ill. Dec. 64, 145 N.E.3d 600 (App. Ct. 1st Dist. 2019), appeal denied, 437 Ill. Dec. 585, 144 N.E.3d 1175 (Ill. 2020).

Memorandum decisions issued by the Supreme Court of Appeals may be cited as legal authority, and are legal precedent through the Court's application of settled law to the facts of a particular case; the legal community should remain mindful, however, that where a conflict exists between a published opinion and a memorandum decision, the published opinion controls. *W. Va. R. App. P. 21(c)*. *In re T.O.*, 796 S.E.2d 564 (W. Va. 2017).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 U.S.—*Graiser v. Visionworks of America, Inc.*, 2016 WL 1359048 (6th Cir. 2016); U.S. v. *Jordan*, 812 F.3d 1183 (8th Cir. 2016); U.S. v. *Engles*, 779 F.3d 1161 (10th Cir. 2015).  
  
Cal.—*Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290, 184 Cal. Rptr. 3d 415 (3d Dist. 2015).  
  
Fla.—*Gawker Media, LLC v. Bollea*, 170 So. 3d 125 (Fla. 2d DCA 2015).  
  
Ky.—*State v. Laflin*, 23 Neb. App. 839, 875 N.W.2d 919 (2016).  
  
Mich.—*Eddington v. Torrez*, 311 Mich. App. 198, 874 N.W.2d 394 (2015), appeal denied, 498 Mich. 951, 872 N.W.2d 474 (2015).  
  
Neb.—*State v. Laflin*, 23 Neb. App. 839, 875 N.W.2d 919 (2016).  
  
Va.—*Samartino v. Fairfax County Fire and Rescue*, 64 Va. App. 499, 769 S.E.2d 692 (2015).

### A.L.R. Library

Precedential Effect of Unpublished Opinions, 105 A.L.R.5th 499, § 4.

- 2 U.S.—*Hupman v. Cook*, 640 F.2d 497 (4th Cir. 1981); U.S. v. *Engles*, 779 F.3d 1161 (10th Cir. 2015); *Peguese v. PNC Bank, N.A.*, 306 F.R.D. 540 (E.D. Mich. 2015).
- Alaska—*O'Dell v. State*, 366 P.3d 555 (Alaska Ct. App. 2016).
- Cal.—*Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290, 184 Cal. Rptr. 3d 415 (3d Dist. 2015).
- Ill.—*CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, 2016 WL 281277 (Ill. App. Ct. 2d Dist. 2016).
- Mich.—*Eddington v. Torrez*, 311 Mich. App. 198, 874 N.W.2d 394 (2015), appeal denied, 498 Mich. 951, 872 N.W.2d 474 (2015).
- Va.—*Samartino v. Fairfax County Fire and Rescue*, 64 Va. App. 499, 769 S.E.2d 692 (2015).
- Using reasoning**  
A rule that restricts counsel from citing unpublished orders does not bar one from using the same reasoning and logic that the court used in that unpublished decision so long as it is not cited as authority.
- Ill.—*Osman v. Ford Motor Co.*, 359 Ill. App. 3d 367, 295 Ill. Dec. 805, 833 N.E.2d 1011 (4th Dist. 2005).
- 3 Md.—*Taylor v. State*, 226 Md. App. 317, 130 A.3d 509 (2016).
- Mich.—*Forgach v. George Koch & Sons Co.*, 167 Mich. App. 50, 421 N.W.2d 568 (1988).
- Nev.—*State, Nevada Employment Sec. Dept. v. Weber*, 100 Nev. 121, 676 P.2d 1318 (1984).
- Pa.—*Com. v. McPherson*, 368 Pa. Super. 274, 533 A.2d 1060 (1987).
- Constitutionality of rule upheld**  
Ark.—*Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003).
- Noncontrolling authority**  
Parties should not submit unpublished opinions to the trial court in the guise of noncontrolling authority.
- Wash.—*Johnson v. Allstate Ins. Co.*, 126 Wash. App. 510, 108 P.3d 1273 (Div. 2 2005).
- Only published by administrative agency**  
Unpublished court cases that are published in an administrative compilation of workers' compensation cases, like other unpublished appellate decisions, are not citable.
- Cal.—*County of San Joaquin v. Workers' Comp. Appeals Bd.*, 117 Cal. App. 4th 1180, 12 Cal. Rptr. 3d 406 (3d Dist. 2004).
- 4 U.S.—*U.S. v. Engles*, 779 F.3d 1161 (10th Cir. 2015).
- Ariz.—*Time, D.C. Freight Lines v. Industrial Com'n of Arizona*, 148 Ariz. 117, 713 P.2d 318 (Ct. App. Div. 1 1985).
- Ill.—*Price ex rel. Massey v. Hickory Point Bank & Trust, Trust No. 0192*, 362 Ill. App. 3d 1211, 299 Ill. Dec. 352, 841 N.E.2d 1084 (4th Dist. 2006).
- Kan.—*Riverside Drainage Dist. of Sedgwick County v. Hunt*, 33 Kan. App. 2d 225, 99 P.3d 1135 (2004).
- 5 Cal.—*Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 199 Cal. Rptr. 3d 66, 365 P.3d 845 (2016).
- Ill.—*Morris v. Union Pacific R. Co.*, 396 Ill. Dec. 330, 39 N.E.3d 1156 (App. Ct. 5th Dist. 2015), appeal denied (Ill. Jan. 20, 2016).

- 6 Ark.—Aaron v. Everett, 6 Ark. App. 424, 644 S.W.2d 301 (1982).
- Md.—Corby v. McCarthy, 154 Md. App. 446, 840 A.2d 188 (2003).
- N.M.—Romero v. City of Santa Fe, 139 N.M. 440, 2006-NMCA-055, 134 P.3d 131 (Ct. App. 2006).
- 7 § 234.
- 8 Fla.—Terry v. State, 467 So. 2d 761 (Fla. 4th DCA 1985).
- 9 U.S.—U.S. v. Austin, 426 F.3d 1266 (10th Cir. 2005).
- Kan.—Riverside Drainage Dist. of Sedgwick County v. Hunt, 33 Kan. App. 2d 225, 99 P.3d 1135 (2004).
- 10 N.C.—State ex rel. Moore County Bd. of Educ. v. Pelletier, 168 N.C. App. 218, 606 S.E.2d 907 (2005).
- 11 U.S.—Baer v. R & F Coal Co., 782 F.2d 600 (6th Cir. 1986).
- N.C.—State ex rel. Moore County Bd. of Educ. v. Pelletier, 168 N.C. App. 218, 606 S.E.2d 907 (2005).
- 12 U.S.—Baer v. R & F Coal Co., 782 F.2d 600 (6th Cir. 1986).
- 13 N.J.—National Union Fire Ins. Co. of Pittsburgh v. Jeffers, 381 N.J. Super. 13, 884 A.2d 229 (App. Div. 2005).
- 14 U.S.—Baer v. R & F Coal Co., 782 F.2d 600 (6th Cir. 1986).
- 15 U.S.—In re Grand Jury Investigation, 445 F.3d 266 (3d Cir. 2006).
- 16 Ohio—State v. George, 50 Ohio App. 2d 297, 4 Ohio Op. 3d 259, 362 N.E.2d 1223 (10th Dist. Franklin County 1975).
- A.L.R. Library**  
Precedential Effect of Unpublished Opinions, 105 A.L.R.5th 499, § 3.
- 17 Wis.—State v. Higginbotham, 162 Wis. 2d 978, 471 N.W.2d 24 (1991).
- 18 U.S.—Lee v. Jacquez, 788 F.3d 1124 (9th Cir. 2015).
- 19 Tex.—Carrillo v. State, 98 S.W.3d 789 (Tex. App. Amarillo 2003), petition for discretionary review refused, (June 4, 2003).
- 20 Ariz.—Associated Aviation Underwriters v. Wood, 209 Ariz. 137, 98 P.3d 572 (Ct. App. Div. 2 2004).